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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BLACK CONSTRUCTION CORPORATION, Appellant

v.

JOSHUA C. AGSALUD, DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; AMADO E. ROSALES and ROGER WIDDIFIELD, Appellees

---

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

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Black Construction
Corporation

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QUESTION PRESENTED

Does the imposition by the State of Hawaii of an employment tax on Black Construction Corporation (hereafter "Black") a Nevada corporation engaged in the construction business solely on the island of Guam which maintains no office, does no business, owns no property, and

neither recruits nor hires any employees in Hawaii contravene the due process clause of the Fourteenth Amendment to the United States Constitution?

DESIGNATION OF CORPORATE RELATIONSHIPS

Black Construction Corporation, filing this Jurisdictional Statement as Appellant in this proceeding, states that:

This is the original Designation of Corporate Relationships.

E.E. Black, Ltd. is the parent of Black Construction Corporation.

E.E. Black, Ltd. is also the parent corporation of:

American Piping & Boiler Company
Durant-Irvine Company, Ltd.
REB Corporation
Holert Electric, Inc.
Holert Guam International, Inc.
Black Micro Corporation
International Equipment of Guam
Guam Mechanical Distributors
P.T.E.E. Black Indonesia Construction
P.T. Pacific Prestress Indonesia

DATED: May 11, 1982.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	4
STATEMENT OF THE CASE	4
SUBSTANTIAL QUESTION	8
CONCLUSION	21
APPENDIX A	
APPENDIX B	

TABLE OF AUTHORITIES

CASES	PAGE
A. G. Bliss Co. v. United Carr Fastner Co., 213 F.2d 541 (1st Cir. 1954)	16
American Oil Company v. Neill, 380 U.S. 451 (1965)	18
Blount v. Peerless Chemicals (P.R.), Inc., 316 F.2d 695 (2d Cir. 1963), cert. denied sub nom Colbert v. Peerless Chemicals (P.R.), Inc., 375 U.S. 831 (1963)	16
Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937)	19
Construction General Life Insurance Co. v. Johnson, 303 U.S. 80 (1938)	17
International Shoe Company v. Washington, 326 U.S. 310 (1945)	10, 11, 19
Miller Brothers Co. v. Maryland, 347 U.S. 340 (1956)	14
Steward Machine Co. v. Davis, 301 U.S. 548, (1937)	18
Tax Commission v. Aldrich, 316 U.S. 181 (1942)	21
Wisconsin v. J.C. Penny Co., 311 U.S. 435 (1940)	13

STATUTES

	PAGE
28 U.S.C. § 1257(2)	4
HRS § 383-2(c)	4
HRS § 383-2(c)(1)	6, 7
HRS § 383-2(c)(3)	7
26 U.S.C. §3306(c)	4
26 U.S.C. §3306(j)	4

MISCELLANEOUS

UNEMPLOYMENT INSURANCE SERVICE, U.S. DEPARTMENT OF LABOR, DRAFT LEGISLATION TO IMPLEMENT THE EMPLOYMENT SECURITY AMENDMENTS OF 1970 . . . H.R. 14750--TOGETHER WITH EXPLANATORY COMMENTARY 31 13

OPINIONS BELOW

The opinion of the Hawaii Supreme Court entered February 16, 1982, the opinion of the First Circuit Court, State of Hawaii, and decision of the Department of Labor and Industrial Relations Appeals Referees' office are set out in the Appendix A hereto. The decision of the Hawaii Supreme Court is not yet reported in a bound volume.

JURISDICTION

This action challenges the Hawaii Supreme Court's decision to affirm a determination made by the Unemployment Insurance Division of the Hawaii State Department of Labor and Industrial Relations (hereafter "U.I. Division") to expand the reach of Hawaii's Employment Security Law to a foreign corporation doing business solely on the island of

Guam on the ground that the application of the Hawaii employment tax would violate the due process clause of the Fourteenth Amendment to the Constitution of the United States. Hawaii's interpretation would impose a serious burden on interstate commerce and drastically upset settled constitutional balances by extending Hawaii's employment tax on a foreign corporation's (i.e. Black) employment in Guam of employees who were neither recruited nor hired in Hawaii and who perform no employment services in the taxing state solely because Black's parent corporation is doing business in Hawaii and some of Black's officers who are not involved in Black's daily business operations reside in Hawaii due to their position as officers of the parent corporation and in spite of a long and consistent line of federal court decisions holding that the

mere residence of a parent corporation or the mere residence of a corporate officer does not constitute "doing business" in the state.

The federal constitutional question was timely raised by the Appellant following the State's determination of coverage and on appeal to the First Circuit Court, State of Hawaii. On February 7, 1979, the Circuit Court summarily determined that the imposition of the employment tax by the State of Hawaii was constitutional under the due process clause of the Fourteenth Amendment to the U.S. Constitution. On January 22, 1982, the Supreme Court of the State of Hawaii affirmed the lower court and unanimously held that the presence of Black's parent corporation in Hawaii and the residence in Hawaii of some of Black's officers even though their residence was due to their position

as officers of Black's parent corporation constituted sufficient contacts to subject a Nevada corporation to Hawaii's employment tax. Judgment was entered on February 16, 1982.

The jurisdiction of the U.S. Supreme Court to review this decision of the Supreme Court of Hawaii on appeal is conferred by 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States, Hawaii Revised Statutes §383-2(c), and I.R.C. §3306(c) and (j) are set out in full in Appendix B hereto.

STATEMENT OF THE CASE

Amado Rosales (hereafter "Rosales") and Roger Widdifield (hereafter "Widdifield"), two former

employees of Black on Guam, applied for unemployment benefits in Hawaii. On November 26, 1975, the U.I. Division sent a letter to Black stating that Rosales and Widdifield had been engaged in employment covered by the Hawaii Employment Security Law and assessed $328.88 in Hawaii employment taxes on wages paid to Rosales and Widdifield in 1975. Although only these two former employees of Black had filed claims for unemployment benefits in Hawaii, the State went on to state that this was a "class determination" covering "all other U.S. citizens - employees performing services for Black Construction in Guam."

Black appealed the action of the U.I. Division and, after a hearing before a referee, a decision affirming the determination was rendered on May 26, 1978. Both the U.I. Division and the Referee based their findings and

conclusions that employment services performed for Black on Guam constituted "employment" taxable by Hawaii solely on the language of Haw. Rev. Stat. §383-2(c)(1) which extends the reach of Hawaii's Employment Security Law to, inter alia, any United States corporation whose principal place of business in the United States is located in Hawaii. The determinations of the U.I. Division and the Referee that Black was in fact doing any business within the State of Hawaii was based on the presence in Hawaii of Black's parent corporation and the residence in Hawaii of some of Black's corporate officers notwithstanding the fact that such officers do not participate in the daily operation of Black's business and reside in Hawaii solely because of the duties they perform as officers of Black's parent corporation.

Black timely appealed to the First Circuit Court, State of Hawaii, from the Decision of the Referee. On February 7, 1979, the Circuit Court affirmed and modified the Referee's Decision by adding an additional ground, Haw. Rev. Stat. §383-2(c)(3), for asserting jurisdiction over the Appellant even though the Hawaii statute expressly provided that §§383-2(c)(1) and (3) were mutually exclusive. The Circuit Court also summarily found the imposition of the tax by Hawaii on the services performed in Guam to be constitutional under the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, §4 of the Hawaii Constitution.

Black timely appealed t .he Supreme Court of the State of Hawaii. On January 22, 1982, the Hawaii Supreme Court affirmed the judgment of the

Circuit Court. The Supreme Court agreed with the Circuit Court, referee and the U.I. Division that Black's "principal place of business in the United States is located in this State." The Supreme Court disagreed with Black's contention that the "employment tax enacted for the privilege of hiring employees is fundamentally unfair as Black neither recruits, hires nor has work performed by employees in Hawaii" and concluded that the presence in Hawaii of Black's parent corporation, E.E. Black Inc., and some of its corporate officers were sufficient contacts, ties or relations to make it reasonable and just for Hawaii to levy its tax on Black.

THE FEDERAL QUESTION IS SUBSTANTIAL

This Court has not yet had the occasion to decide under what circumstances, if any, a state may

constitutionally, under the due process clause of the Fourteenth Amendment to the United States Constitution, impose its employment tax on a foreign corporation's employment outside the taxing state of employees who perform no services in the taxing state. The decision of the Supreme Court of Hawaii permits Hawaii to levy an employment tax upon Black despite the established facts that Black is incorporated in the State of Nevada; carries on no construction operations in Hawaii; owns no property and maintains no office or records in Hawaii; and does not have any employees pursuing its construction business in Hawaii.

Upon examination and interpretation of the decisions of this Court and the various lower federal courts regarding the imposition of taxes, it is clear that the imposition of the employment tax on Black by Hawaii does

not comport with the due process clause of the Fourteenth Amendment to the United States Constitution.

In only one case, International Shoe Company v. Washington, 326 U.S. 310 (1945), has this Court passed upon the constitutionality under the due process clause of a state tax on the employment of employees by a foreign corporation. In that case, the State of Washington sought to impose its employment tax on the employment by International Shoe Company, a Delaware corporation, with its principal place of business in St. Louis of salesmen present in Washington to solicit mail orders. After reaching its landmark determination that International Shoe Company had "sufficient contact or ties" with Washington "to make it reasonable and just, according to our traditional conception of fair play and substantial justice" for the Company to

be sued for the employment tax in Washington courts, 326 U.S. at 320, this Court went on to uphold the constitutionality of the tax itself, 326 U.S. at 321-22.

The decision in International Shoe suggests that a close relationship exists between the due process standards for in personam jurisdiction and the standards governing a state's jurisdiction to impose employment taxes on foreign corporations. "The activities which establish . . . (International Shoe's) 'presence' subject it alike to taxation by the state and to suit to recover the tax." 326 U.S. at 310. Moreover, the Court's conclusions concerning the activities of International Shoe in Washington suggest that state employment taxes on foreign corporations must satisfy the same due process tests that this Court has

established for the imposition of other state taxes on foreign corporations: (1) whether there are sufficient contacts by the corporation with the taxing state for it to be assumed that the corporaton has benefited from the state's services and (2) whether there is a sufficient relationship between the corporate activities that the state seeks to tax and the corporation's activities in the taxing state.

The Supreme Court of Hawaii concluded that Black's principal place of business in the United States is located in Hawaii because of the presence in Hawaii of Black's parent corporation and some of Black's officers and therefore it was reasonable and just for Hawaii to levy its employment tax on Black because Black has more significant contacts, ties, or relations with Hawaii than with any other American Jurisdiction. In so

ruling the Supreme Court of Hawaii ignored the express admonition of the U.S. Department of Labor in its official commentary to the model law adopted by Hawaii that there would be some American employers who had no place of business within the United States.[1/]

This Court stated in Wisconsin v. J.C. Penny Co., 311 U.S. 435, 444 (1940):

> A state is free to pursue its own fiscal policies, unembarrassed

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1/ The commentary reads as follows:

> The Employers of the great majority of U.S. citizens working for American employers outside the United States have a place of business in the United States. In some cases, however, an American employer may be physically located entirely outside the United States and have no place of business in the United States. (emphasis added).

Unemployment Insurance Service, U.S. Department of Labor, Draft Legislation to Implement the Employment Security Amendments of 1970 . . . H.R. 14750 -- Together with Explanatory Commentary 34.

> by the Constitution, if the state has exerted its power in relation to opportunities it has given to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society.

Further, to assure that a state tax is justified by such reciprocal state benefits this Court's decisions with respect to taxation "reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-45 (1956).

Black Construction does not receive any advantage or service from the State of Hawaii in return for the employment tax Hawaii seeks to impose upon it. Black does not receive any

benefit from the tax's maintenance in Hawaii of a pool of trained workers; it receives no state administrative services; it owns no property nor does it maintain any office or records in Hawaii that would benefit from Hawaii's judicial, police, fire or other societal services; and it does not have any employees pursuing its construction business in Hawaii. While it is true as found by Hawaii's Supreme Court that Black Construction is the wholly owned subsidiary of E.E. Black Ltd., a Hawaii corporation, which has its principal place of business in Hawaii; that four of Black's eight officers are also officers of E.E. Black Ltd. and that three of Black's officers who live on Guam are paid through E.E. Black, Ltd. so that they can receive "stateside-type" fringe benefits (with reimbursement from Black Construction), all decisions as to the

day-to-day operations of Black are made on Guam by officers who live on Guam and these Guam-based officers submit all of the Company's contract bids for construction work, which is performed by Black Construction's employees on Guam only. Our federal courts have long and consistently held that the presence of a parent corporation or the residence of some corporate officers in the taxing state does not mean that a separately incorporated subsidiary corporation is doing business in the taxing state so as to satisfy constitutional due process requirements. Blount v. Peerless Chemicals (P.R.) Inc., 316 F.2d 695 (2d Cir., 1963), cert. denied sub nom Colbert v. Peerless Chemicals (P.R.) Inc., 375 U.S. 831 (1963); A.G. Bliss Co. v. United Carr Fastner Co., 213 F.2d 541 (1st Cir., 1954).

The absence of appreciable links, connection or contacts with the State of Hawaii establishes that Black did not benefit from any of Hawaii's services and thus mandates a finding that Hawaii cannot constitutionally impose its employment tax on Black.

Further, due process requires not only minimum beneficial contacts but also a relationship between the corporate activities that a state seeks to tax and the corporation's activities in the taxing state. "(A) state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies the state power to tax or regulate the corporation's property and activities elsewhere." Construction General Life Insurance Co. v. Johnson, 303 U.S. 77, 80-81 (1938). This Court in American Oil

Company v. Neill, 380 U.S. 451 (1965) held that the due process clause precluded the State of Idaho from requiring a foreign corporation to pay a tax on its sale of fuel in Utah, even though the corporation was a licensed Idaho dealer and knew that the fuel was to be used in Idaho.

> The Corporation can . . . exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances, the transactions are said to be "dissociated from the local business," Norton Co. v. Department of Revenue, supra, 370 U.S. at 537, and therefore may not, consistent with due process, be taxed.

Id. at 458.

This Court has characterized the federal employment tax as an "excise on the relations of employment." Steward Machine Co. v. Davis, 301 U.S. 548, 578

(1937), and has characterized state taxes to fund unemployment compensation funds as taxes on the right to employ labor. International Shoe Co. v. Washington, 326 U.S. 310, 321 (1945); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 508 (1937).

The activity Hawaii seeks to tax through its Employment Security Law is the right to employ labor in Hawaii. However Black clearly does not recruit, hire or employ any labor in Hawaii. The construction employees who are actually performing Black Construction's business activities are hired on Guam; they reside on Guam; they perform their services on Guam; and their personnel matters are handled by Black's personnel office on Guam. Black Construction does not own any property in Hawaii and does not derive any revenue from any business activity with persons who reside in the

taxing state. Black is a Nevada construction corporation that performs its construction work solely on the Island of Guam. It does not seek or accept contracts to perform construction work in Hawaii. Thus there is clearly no relationship between Black's employment activities on Guam and Hawaii's employment tax.

Further, Black, a Nevada corporation, is subject to Nevada law and has complied with the unemployment insurance laws of the State of Nevada since 1975. Thus, even if this Court were to reverse the Hawaii Supreme Court's decision, no U.S. citizen employed by Black will be denied benefits.

In summary, the opinion of the Hawaii Supreme Court permits the unconstitutional imposition by Hawaii of an employment tax on a Nevada corporation performing construction work exclusively

on Guam. As Justice Frankfurter succinctly stated:

> Of course, the Due Process Clause has its application to the taxing powers of the States - a State cannot tax a stranger for something that it has not given him. When a State gives nothing in return for exacting a tax it may be said that there is no "jurisdiction" to tax.

Tax Commission v. Aldrich, 316 U.S. 181, 183 (1942) (concurring opinion).

CONCLUSION

The decision by the Hawaii Supreme Court permitting the imposition of its employment tax on a Nevada corporation doing business solely on the island of Guam raises a substantial federal constitutional question.

Accordingly, this appeal should be accorded plenary review.

DATED: Honolulu, Hawaii, May 10, 1982.

Respectfully submitted,

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